TABLE OF CONTENTS

	Page
Jurisdictional Statement on Appeal from Supreme Court of Ohio	1
Appendix A—Opinion of Supreme Court of Ohio	6
Appendix B—Rehearing Docket	18
Appendix C—Judgment Entry and Decree, Court of Common Pleas, Hamilton County, Ohio	19
Appendix D—Judgment Entry of Affirmance, First District Court of Appeals, Hamilton County, Ohio	21
Appendix E—Opinion of Court of Appeals, First Appellate District of Ohio	22
Appendix F—Statutes:	
Ohio Revised Code, Sections 133.71 to 133.80	23-30

AUTHORITIES CITED

Cases:

Cincinnati v. L&N R.R. Co., 223 U.S. 390	2
Cincinnati v. White, 6 Peters 421	2
State ex rel v. Portsmouth, 139 O.S. 351, 44 N.E.2d 144, 97 ALR 1103	4
Way v. Borois, 175 O.S. 331	4

Statutes:

Amendment XIV, Section 1, U. S. Constitution	2, 3, 4
Article I, Section 10, U. S. Constitution	5
Article II, Section 28, Ohio Constitution	5
Article 12, Sec. 2, Ohio Constitution	4
General Assembly of Ohio Revised Statutes 3283 A	5
Ohio Revised Code, Section 133.72	4
Ohio Revised Code, Section 133.80	3

Other Authorities:

316 Page 391 Vol. 51 Ohio Jur. 2nd R.S. Ohio 5707.02	4

In The

SUPREME COURT OF THE UNITED STATES

No. ———

HAMILTON COUNTY, OHIO, ISSUER,
Plaintiff-Appellee,

vs.

ROGER CLOUD, Auditor of the State of Ohio

FRED J. MORR, County Auditor of Hamilton County, Ohio

Defendants-Appellees

ALL PROPERTY OWNERS, TAXPAYERS, AND CITIZENS OF HAMILTON COUNTY, OHIO, INCLUDING NONRESIDENT OWNERS OF PROPERTY SUBJECT TO TAXATION OF SPECIAL ASSESSMENT BY HAMILTON COUNTY AND ALL OTHER PERSONS AFFECTED OR INTERESTED.

Defendants-Appellants.

JURISDICTIONAL STATEMENT ON APPEAL FROM SUPREME COURT OF OHIO

Case No. 41386

This appeal questions the spending of more than Forty Five Million ($42,250,000.00) Dollars, in petition and amount increased to $44,000,000.00 in bonds issued within a month plus other expenditures subsequently authorized after decision of Supreme Court of Ohio, and all without submitting the issue to a vote of the people.

The commissioners of Hamilton County, Ohio brought a so called validation action against Roger Cloud as auditor of the State of Ohio and naming all residents of Hamil-

ton County, Ohio as Defendant and one of your petitioners were specifically named as defendant and other by entry as amicus curiae. Mr. Graham P. Hunt Jr. demurred and Mr. Robert H. Fosdick filed an answer and cross petition. Ohio Appellate Court gave a per curium opinion for its decision after twice advancing setting for appeal, three Judges concurring, two hearing the appeal. This was done before motion for new trial had been ruled upon. Appeal was continued for 12 days when this was called to the Court's attention. The Supreme Court of Ohio, in its expedited hearing dismissed appeal upon a technicality although Mr. Hunt was in communication with administrative deputy clerk of Ohio Supreme Court, who assured him his notice of appeal which he had already duly filed in the Court of Appeals would be considered as a timely filing. It had been so considered by Court of Appeals. This cause had been consolidated with and heard at the same time as a taxpayer action concerning same subject. This taxpayer action had been admitted to the Ohio Supreme Court upon motion to certify. Both actions were simutaneously dismissed. Separate opinion by Judge Zimmerman hereto attached, stated it was unfortunate that an issue of this magnitude had not been submitted to a vote of the people.

The record discloses an arrangement between City and County regarding financing. Ohio Supreme Court holds bonds which were to be *revenue* Bonds are in effect *general obligation* bonds of the City. In addition, stadium is being built on Public landing which this court, 223 U.S. 390 *Cincinnati* v. *L&N R.R. Co.* and 6 Peters 421 *Cincinnati* v. *White,* land held in trust by city for *public landing.* It is submitted that this use is destroyed, that enormous sums are taken without due process of law contrary to Amendment XIV Section 1, U. S. Constitution. For Court of Appeals requiring defendants to proceed out of

order with only two Judges in attendance at a three Judge court, which exception was preserved by entry in record herein and hereto attached and for other errors manifest of record and as a matter of substantial public interest and involving the lower courts ignoring of ruling and of this court we submit this cause should be reversed.

1. Fastening on taxpayer expenditure of upwards of $45,000,000.00 (increased since Ohio Supreme Court ruled) without a vote of the people, i.e. constitutionality of 133.71 to 133.80 revised statutes of Ohio.
2. All residents of Hamilton County made parties but only participants may be specifically liable for costs.
3. Undue pressure of appellate courts and shortening time ordinarily permitted for appellate work.
4. Unwillingness of plaintiff to proceed in accordance with plans filed with Court. These plans not even presented although alleged to be filed until these defendants pointed out to trial Judge they were not filed and he then ordered them brought in.
5. It is requested that if Mr. Justice Stewart does not participate (as this is a Cincinnati case) that an appellate Judge be called in as thereby to avoid the possibility of a 4 to 4 decision might be eliminated.

Further the Court should entertain jurisdiction because defendants Graham P. Hunt Jr. and Robert Fosdick and all other defendants have been denied due process of law and the equal protection of the laws guaranteed by Amendment XIV Section 1 of the U. S. Constitution.

Section 133.80 of the Ohio Revised Code under which the land validation action was brought and under which validation action all tax payers in Hamilton County were made parties Defendant provides:

> "The costs of each action under sections 133.71 to 133.80 inclusive of the Revised Code, shall be paid

by the petitioner, except where a taxpayer, citizen, or other person has contested the action, intervened therein, or appealed, the Court may tax the whole or such part of the costs against such person as is equitable and just."

What the statute in effect says is that any defendant who has taken an active part in the proceeding can be penalized in accordance with the extent of his participation — even for the extent to which his fellow defendants participate.

Since the costs in this case could have easily exceeded $5000.00 if it had been prosecuted to its fullest extent, such singling out of any one defendant or group of defendants constitutes a threat that denies him, them and all taxpayers of Hamilton County, Ohio rights secured to them by Section 1 amendment XIV of the U.S. Constitution.

It is submitted that the doubt expressed in Judge Zimmerman's concurring opinion in the Ohio Supreme Court is indicative that the doubt he expressed that the validation bonds $42,250,000.00 prayed for $44,000,000.00 issued within weeks of this opinion are illegal as sponsers have failed to prove the bonds issued are not violative of the 10 mill tax limitation in Ohio. Article 12 Sec. 2 Ohio Constitution which under Section 133.72 R.C. Ohio Plaintiffs are required to do. 139 O.S. *State ex rel* v. *Portsmouth* 351, 44 N.E. 2nd 144 also 97 ALR 1103. The tax funds for servicing this bond service are from real estate and later case of *Way* v. *Borois* 175 O.S. 331 therefore does not offer a limitation. This is the last case cited in the advance sheets in regard to sec. 316 Page 391 Vol 51 Ohio Jur 2nd R.S. Ohio 5707.02.

The dedication to public use forever of the common or public landing in January, 1787 was a contract between the dedicator and the subsequently created City of Cin-

cinnati by which the City of Cincinnati became perpetually obligated to hold the same in trust for the public; and in as much as the power of eminent domain either inherent or deligated except for the common preservation, did not reside in the northwest territory at the time of the dedication, and therefore was not read into the contract of dedication the act of the General Assembly of Ohio Revised Statutes 3283 A, if applicable to the common or public landing on Cincinnati is unconstitutional and void in that it is in Violation of Article 1 Section 10 of the U.S. Constitution and Article II Section 28 of the Ohio Constitution in effect in 1908.

Respectfully submitted,

ROBERT H. FOSDICK
Member of the Bar of the Supreme Court of the United States
GRAHAM P. HUNT, JR.

APPENDIX A

SUPREME COURT OF OHIO

(CAPTION OMITTED)

OPINION

Nos. 41118 and 41386

Decided January 24, 1968.

(Rehearing denied February 14, 1968)

TAFT, C. J. In each case, the record disclosed that the proposed stadium is designed to accommodate large crowds (approximately 50,000) at athletic and other exhibitions, including major league baseball and major league football games.

In the injunction case, it is contended that the city may not erect and maintain the stadium with public funds because the stadium is "designed to peculiarly benefit a few individuals rather than the public in general."

In support of that contention, the plaintiff states that those who will use the stadium are to pay less for that use than will be required to erect and maintain it, and that as a result a substantial anticipated loss to the city will have to be absorbed by its taxpayers.

There is in the record a report of certain experts as to estimated annual net revenues of about $1,300,000 available for fixed charges on the county's revenue bonds. In arguing that there will be an annual deficit of $700,000 in the amount available for debt charges on the bonds, plaintiff has apparently used a figure of $2,000,000 as representing the amount of those charges. That figure appears to be reasonable. However, there is in the record the proposal to lease the stadium, made by the owners of the major

league baseball team known as the Cincinnati Reds. A consideration of this lease with the foregoing report indicates that there may be, if the estimates as to attendance and parking and advertising revenues of the report are correct and no unforeseen complications arise, substantially more net revenue than the amount which the foregoing report had estimated would be received from the major league baseball use of the stadium.

Unfortunately, the evidence, as to anticipated revenues and the requirements for debt service, especially in the absence of any analysis thereof in the brief of either party, is very sparse and quite vague. Thus, we cannot determine from the record whether the proposed stadium operations will or will not provide the city with enough money for payments on its proposed lease from the county. Since the burden of proof was on plaintiff on this issue, we must conclude that the record does not reasonably support a finding that a substantial amount of the rental on the lease from the county will have to be provided for by taxation. Therefore there is no basis in the record for plaintiff's contention that the stadium is "designed to peculiarly benefit a few individuals rather than the public in general."

Plaintiff in the injunction case also contends that the city is not authorized to erect and maintain a stadium, to rent it to private persons for their use and profit, or to rent advertising space on its scoreboard.

In support of these contentions, it is argued that a city is limited in its activities to those specified in the Revised Code. However, by reason of Sections 3 and 7 of Article XVIII of the Ohio Constitution, a charter city has *all* powers of local self-government, except to the extent that those powers are taken from it or limited by other provisions of the Constitution or by statutory limitations on the powers of a municipality which the Constitution has

authorized the General Assembly to impose. See paragraph three of the syllabus of *State ex rel. Gordon* v. *Rhodes* (1951), 156 OhioSt. 81, 45 O.O. 93, 100 N.E. (2d) 225, and *State ex rel. Bruestle* v. *Rich* (1953), 159 OhioSt. 13, 50 O.O. 6, 110 N.E. (2d) 778. For examples of such authorizations of statutory limitations, see Section 13 of Article XVIII and Section 6 of Article XIII of the Ohio Constitution.

As stated in paragraph two of the syllabus of the *Gordon case:*

> "The determination of what constitutes a public municipal purpose is primarily a function of the legislative body of the municipality, subject to review by the courts, and such determination by the legislative body will not be overruled by the courts except in instances where that determination is manifestly arbitrary or unreasonable."

In support of these contentions, plaintiff cites *Cleveland* v. *Board of Tax Appeals* (1951), 153 OhioSt. 97, 41 O.O. 176, 91 N.E. (2d) 480, and *Board of Park Commissioners of Troy* v. *Board of Tax Appeals* (1954), 160 OhioSt. 451, 52 O.O. 338, 116 N.E. (2d) 725, which followed it. These cases, especially the *Cleveland case,* involved the question whether operations, comparable to the proposed operations of Cincinnati with respect to its stadium, amounted to uses of property such as the stadium *exclusively* for public purposes.

As recognized in *Columbus* v. *Delaware [In re Application for Exemption]* (1956), 164 OhioSt. 605, 59 O.O. 10, 132 N.E. (2d) 747; *Cleveland* v. *Board of Tax Appeals* (1958), 167 OhioSt. 263, 4 O.O. (2d) 309, 147 N.E. (2d) 663; and *Graf* v. *Warren* (1967), 10 OhioSt. (2d) 32, 39 O.O. (2d) 19, 225 N.E. (2d) 262, there may be public purposes of a proprietary nature.

All opinions in *Cleveland* v. *Board of Tax Appeals, supra* (153 OhioSt. 97, 41 O.O. 176) recognize that the use of the Cleveland stadium represented a use for public purposes. The majority opinion merely held that there was no *exclusive* use for such purposes and that such an exclusive use was required for tax exemption.

As stated in my opinion in that case, at page 131:

> "In a large city the opportunities for open-air athletics are limited and yet the need therefor is greater than in less congested communities. That need is of the same nature as the need that results in a city providing public parks for its citizens. In this country, baseball and football are national pastimes and a great source of public relaxation and entertainment. No one will question the extent of the public interest in the activities of the Cleveland professional baseball and football teams.
>
> "The construction and operation of modern open-air stadiums have not been developments of private enterprise. They originated in the athletic needs of schools and colleges and have been undertaken generally as municipal functions throughout the country. Even if the development and operation of such an enterprise were left to private initiative, it would require so much governmental policing and regulation that such policing and regulation alone might represent the largest part of its operation. To best answer public needs, such an enterprise should be as near the center of the city as possible. Crowds running up to 85,000 cannot be safely handled in the center of a large city except by public authority. Order must be maintained inside and outside the building. These traffic and police problems and the public evils that might arise from sale of intoxicating liquors and from gambling, if the enterprise were not conducted as a public enterprise, are important factors which justify the conduct of such enterprise at all times under governmental supervision."

In *Cleveland* v. *Carney* (1961), 172 OhioSt. 189, 15 O.O. (2d) 334, 174 N.E. (2d) 254, the syllabus reads:

> "A municipal auditorium and exhibit hall owned by a city, staffed and supervised in all its uses by city employees and officials and intended and used for trade shows, conventions, meetings of various civic, religious and educational institutions, and concerts and shows which are open to the public for a fee and which are promoted and conducted by concessionaries for a limited time only is used for the benefit of the public of the city and is 'public property used exclusively for any public purpose' within the meaning of Section 5709.08, Revised Code, and Section 2, Article XII of the Constitution of Ohio."

Without question, the city would have authority under its home-rule powers to provide parking space adjacent to the stadium. *State ex rel. Gordon* v. *Rhodes, supra* (156 OhioSt. 81, 45 O.O. 93); *Graf* v. *Warren, supra* (10 Ohio St. (2d) 32, 39 O.O. (2d) 19). See *Columbus* v. *County of Franklin* (1958), 167 OhioSt. 256, 260, 4 O.O. (2d) 298, 147 N.E. (2d) 265.

As to the sale of advertising space on the scoreboard, this obviously will be incidental to the operation of the stadium and would not prevent the proposed operation of the stadium by Cincinnati from being authorized as involving generally a public purpose. See *Carney* v. *Ohio Turnpike Commission* (1958), 167 OhioSt. 273, 4 O.O. (2d) 315, 147 N.E. (2d) 857 (holding "all * * * property * * * comprising * * * Ohio Turnpike * * * and all concomitants connected with its * * * operation * * * including the parts of plazas leased or rented to private persons and where food and drink are supplied and gasoline, oil and motor-vehicle accessories are furnished * * * although at a profit * * * used *exclusively* for a public purpose").

(Emphasis added.) See also *Toledo* v. *Jenkins* (1944), 143 OhioSt. 141, 28 O.O. 72, 54 N.E. (2d) 656.

We conclude that a charter municipality may construct a stadium which is designed to accommodate large crowds at athletic and other exhibitions and may rent that stadium to private persons who will provide such exhibitions; that the municipality may do so even though such private persons will derive profits from providing those exhibitions; that in connection with the construction and operation of such a stadium, a municipality may acquire land and devote it to automobile parking and derive a profit from doing so; and that; as an incident to the construction and operation of such stadium, a municipality may construct and maintain a scoreboard and derive revenue from the sale of advertising space thereon.

In the injunction case, plaintiff complains further about a part of an agreement between the city and the corporation which owns the Cincinnati Reds baseball club, by which the city agrees to purchase the present baseball park of that team, which is known as Crosley Field, "at a price to be determined by a jury in an eminent domain procedure but which price shall be not less than two million dollars ($2,000,000)." This agreement is part of an offer by that corporation to the city, which has been accepted by the city. Under this offer, the foregoing agreement to purchase is apparently (we say apparently because a copy of the offer is not in the record but is only summarized in the ordinance of the city accepting it) part of the consideration to be paid by the city for execution by that corporation of the hereinbefore referred to 40-year lease of the stadium for use during the baseball season.

Although there may be some doubt as to the validity of such an agreement, especially to the extent that it provides for payment of $2,000,000 for Crosley Field event if a jury

determines its value to be less than that amount, we do not believe it is necessary for us to determine the validity of that agreement. This is an action to enjoin expenditure of funds on the proposed stadium — not an action to enjoin the foregoing proposed purchase of Crosley Field by the city.

There is nothing in the record to indicate that the invalidity of that agreement, to purchase Crosley Field on the terms specified therein, would substantially affect the determination or the legal authority of the city to proceed with the stadium project, especially since there is no evidence in the record as to the value of Crosley Field.

Finally, the plaintiff in the injunction action contends that the city may not lend its credit to the county for the purpose of enabling the county to borrow money; and that the substantial amount of revenue bonds to be issued by Hamilton County to provide funds for the stadium project will in effect be obligations of the city.

In contending that the city may not so lend its credit, plaintiff relies on the part of Section 6 of Article VIII of the Constitution of Ohio which provides that "no laws shall be passed authorizing any county, city [or] town * * * to become a stockholder in any joint stock company, corporation or association whatever; or to raise money for, or to loan its credit to, or in aid of, any such company, corporation or association * * *."

This court has held that these provisions do not prevent a county from raising money for or lending its credit to a city (*State ex rel Speeth* v. *Carney* [1955], 163 OhioSt. 159, 56 O.O. 194, 126 N.E. (2d) 449), or to a public organization such as an agricultural society organized to hold annual agricultural fairs (*State ex rel. Leaverton* v. *Kearns* [1922], 104 OhioSt. 550, 136 N.E. 217). See also *State ex rel. Kauer* v. *Defenbacher* (1950), 153 OhioSt. 268, 41

O.O. 278, 91 N.E. 512, so construing a comparable provision against loaning state credit.

In our opinion, although that constitional provision forbids the lending of a city's credit to or in aid of a private business enterprise, such as that involved in *State ex rel. Wilson* v. *Hance* (1959), 169 OhioSt. 457, 8 O.O. (2d) 471, 159 N.E. (2d) 741, it does not prohibit such lending by a city to a public organization such as a county.

We agree that the proposed revenue bonds of Hamilton County will in effect be obligations of the city. Under both the plan considered in the injunction case and the plan disclosed by the record in the bond validation case, Hamilton County is to issue, pursuant to Section 133.06, Revised Code, revenue bonds due serially over a period of 40 years to provide money needed for acquisition of the site and for construction of the stadium project; the city is to convey this site to the county; the county is to pay the city from the proceeds of those bonds money for construction of the stadium project; the city is to arrange for construction of that project; the county is to lease the stadium project to the city for 40 years; the city obligates itself under that lease and the co-operative agreement with the county to pay rent in each year to the county in an amount sufficient to enable the county to pay interest and principal on the bonds that will be due in that year; the county is to have no obligation on its revenue bonds other than to use the rent received from the city to pay that interest and principal; and that rent is to be the only source for payment of that interest and principal.

All parties recognize that, if revenues paid to the city by users of the stadium project do not provide the city with enough money to pay the rent, the city is to be obligated to provide the additional money needed.

Thus, in effect, the city has obligated itself to pay rent

that will in each year be sufficient to pay the interest and principal that will become due on the county bonds. Therefore, if it may so obligate itself, the *proposed revenue bonds* of the county *will in effect be general obligations of the city.*

Plaintiff argues that the city may not so obligate itself because "those residents of the county who also happen to be residents of the city will have their general tax funds used to retire the bonded indebtedness, even though Section 133.06, Revised Code, says that this is illegal." From the brief of the defendants Bazell (plaintiff in the injunction case) and Kelley in the bond validation case and from arguments on behalf of them in that case and on behalf of Bazell in the injunction case, the theory of this argument appears to be that, since the city will be obligated to levy taxes on its taxpayers to raise money necessary to pay the rent and since city taxpayers are also county taxpayers, the county's revenue bonds will not conform with the part of Section 133.06, Revised Code, which is quoted in the brief of Bazell and Kelley in the bond validation case and which states that county revenue bonds "shall not constitute general obligations of the county and the general credit and taxing power of the county shall not be pledged to the payment of any part thereof." However, assuming that these county bonds are general obligations of the city and that the general credit and taxing power of the city is pledged to their payment, it does not follow that these bonds are general obligations of the county or result in a pledge of the general credit and taxing power of the county so as to violate the foregoing relied upon parts of Section 133.06, Revised Code.

In the injunction case, the second amended petition alleges that, in going forward with the stadium project, the city is proposing "to loan its credit beyond authorized debt limitation to Hamilton County" and in its brief in that case in this court plaintiff states that "the real obligor"

of the county's revenue bonds is to be the city. However, there is no evidence in the record of that case that would enable a finding as to any debt limitation of the city.

The other questions raised by plaintiff in the injunction case have, on the record before us, insufficient merit to justify any comment by this court.

For the foregoing reasons, the judgment of the Court of Appeals in the injunction case must be affirmed.

In the bond validation case, the reply of the county to the answer of the city states that, if the obligation of Cincinnati to pay rent under the lease from and under the co-operative agreement with the county (which is the only source of payment and security for the revenue bonds which the county proposes to issue) is regarded as part of the "bonds and notes" of Cincinnati within the meaning of Section 133.02, Revised Code, then the city would exceed the maximum net indebtedness that it is authorized to incur under Section 133.03, Revised Code.

By Section 133.03, Revised Code, "the net indebtedness created or incurred by a municipal corporation" is specifically limited to certain percentages "of the total value of all property in such municipal corporation as listed and assessed for taxation."

Thus, the foregoing reply of the county suggests that if the proposed obligation of the city to pay rent is included as an indebtedness of the city in determining its "net indebtedness," the city would exceed the debt limitation imposed upon it by Section 133.03, Revised Code.

In our opinion, we should disregard any question as to whether that debt limitation will be exceeded.

Notwithstanding the foregoing suggestion in the reply of the county, no party before this court in the bond validation case raised any question by brief or argument as to whether the proposed obligation of the city to pay rent should be included as an indebtedness of the city

in determining its "net indebtedness." In other words, any claim of error in not so including that obligation or any question as to whether it should be so included was not raised in this court. As stated in Section 2505.21, Revised Code, "errors not specifically pointed out in the record *and* separately argued by brief may be disregarded." See also Section 4 of Rule II of this court requiring "a concise statement of the questions of law presented."

It is particularly dangerous for a court of last resort to pass upon a claimed error of law, which has not been pointed out to it and briefed by any party, especially where an important question of law is involved. Unless such claimed error has been pointed out by a party and argued by brief, an opposing party has no opportunity to answer the argument or demonstrate that it is without merit. If this court does not disregard such an error, it runs the unnecessary risk of making an erroneous determination on an important question of law — a determination which cannot be corrected on any appeal from its judgment.

In the bond validation case, defendants Hunt and Fosdick filed briefs in this court as appellants. Although notices of appeal were filed in the Court of Appeals by those two defendants on December 12, 1967, no copies of those notices were filed by those defendants in this court within 20 days thereafter, as required by Section 1 (A) of Rule I, of this court, and hence their appeals are dismissed pursuant to Section 1 of Rule II.

Upon the filing of the notice of appeal by defendants Kelley and Bazell, which claims that a substantial constitutional question is involved in the bond validation case, the Clerk of the Court of Appeals, pursuant to Section 2505.08, Revised Code, and notwithstanding Section 9 of Rule II of this court, certified the record in that case to this court. Hence, this court has considered the record in

that case in determining that there is no question of public or great general interest raised therein.

There being no substantial constitutional question raised by defendants Kelley and Bazell in the bond validation case, their appeal in that case is dismissed *sua sponte*, and their motion to certify the record therein will be overruled.

Judgment affirmed in case No. 41118.

Appeal dismissed in case No. 41386.

ZIMMERMAN, MATTHIAS, O'NEILL, HERBERT, SCHNEIDER and BROWN, JJ., concur.

ZIMMERMAN, J., concurring. *To the writer, it seems unfortunate that a project of the magnitude and cost of the one involved here was not submitted to the electorate of the affected territory for approval or disapproval.*

Although the records in these two cases do not disclose it, it may well be that the obligation which the city may have to meet from unvoted tax moneys in connection with the stadium project may be in an amount exceeding the ten-mill tax limitation fixed by law. See Section 5705.02 *et seq.*, Revised Code.

However, as pointed out in the opinion of the court herein, *the manner in which these two cases were presented to the trial court* justified the judgment rendered there and supports the judgments of affirmance rendered by the Court of Appeals and the judgments rendered by this court.

APPENDIX B

(CAPTION OMITTED)

REHEARING DOCKET

Announced February 14, 1968

Rehearing Denied

41386. Hamilton County, Ohio, appellee v. Roger Cloud, Aud. of State, et al.; Walter A. Kelley et al., appellants. Hamilton County.

APPENDIX C

COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

No. A-224574

HAMILTON COUNTY, OHIO,
Issuer, Plaintiff,

vs.

ROGER CLOUD,
Auditor of the State of Ohio;

FRED J. MORR,
County Auditor of Hamilton County, Ohio; and

ALL PROPERTY OWNERS, TAXPAYERS, AND CITIZENS OF HAMILTON COUNTY, OHIO, INCLUDING NON-RESIDENT OWNERS OF PROPERTY SUBJECT TO TAXATION OR SPECIAL ASSESSMENT BY HAMILTON COUNTY AND ALL OTHER PERSONS AFFECTED OR INTERESTED,
Defendants.

JUDGMENT ENTRY AND DECREE

October 13, 1967

Upon all the evidence introduced, including testimony, exhibits and facts admitted by the pleadings, and in accordance with the Findings of Facts and Conclusions of Law heretofore determined, this Court finds that Issuer-Plaintiff has authority to issue $42,250,000.00 principal amount Stadium Revenue Bonds, 1967 Series, for the purpose of paying the cost of constructing a public stadium

with related parking facilities, including the cost of the site therefor, and all things incidental and necessary in connection therewith, pursuant to a cooperative agreement with the City of Cincinnati dated May 12, 1967, under Section 153.61 of the Revised Code of Ohio and to secure the same with the revenue from the proposed lease contained in said cooperative agreement. This Court further finds that the proceedings taken in connection with the issuance of said bonds and the security therefor are in all respects legal and valid, and the conveyance of the real estate and leasing of the stadium and other unexecuted items of the cooperative agreement as provided for in the resolution of the Board of County Commissioners authorizing said agreement and the resolution authorizing said bonds are in all respects legal and valid.

Provided, however, that all procedural steps required to be taken for the completion of the issuance and sale of said bonds, after the date hereof, shall be properly taken in accordance with applicable provisions of law and the terms of this decree.

Exceptions are reserved to all parties who opposed the plaintiffs herein.

APPENDIX D

In The

FIRST DISTRICT COURT OF APPEALS
HAMILTON COUNTY, OHIO

No. 10377

HAMILTON COUNTY, OHIO,
Plaintiff-Appellee,

vs.

ROGER CLOUD, ET AL.,
Defendants-Appellants.

JUDGMENT ENTRY OF AFFIRMANCE

This cause came on for hearing upon the appeal on questions of law, the transcript and the original papers and pleadings from the Court of Common Pleas of Hamilton County, and was argued by counsel, on consideration whereof the Court finds there is no error apparent on the record in such proceedings and judgment prejudicial to the appellants and the judgment is therefore affirmed.

To all of which appellants except.

APPENDIX E

In The

COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO

(CAPTION OMITTED)

OPINION

November 20, 1967

Appeal on Questions of Law from Court of Common Pleas Hamilton County, Ohio

Messrs. Peck, Shaffer & Williams, Judson Allgood, Andrew Conroy and Frederick Keil of counsel, for Plaintiff-Appellee,

Messrs. Melvin G. Rueger and John Gehrig, for County Auditor,

Mr. E. Ronald Grossheim for Walter A. Kelley and Haskell Bazell,

Messrs. William A. McClain and William H. Brewe and Miss Isabel Guy, for City of Cincinnati, Defendant-Appellee,

Mr. Graham P. Hunt, Jr., in propria persona

Mr. Robert Fosdick, in propria persona.

PER CURIAM.

An examination of the record discloses no error prejudicial to the rights of Appellant. The judgment of the Court of Common Pleas, Hamilton County, Ohio is, therefore, affirmed.

LONG, P. J., HOVER and HILDEBRANT, JJ., CONCUR.

APPENDIX F

STATUTES

OHIO REVISED CODE:

[VALIDATION OF SECURITIES]

Section 133.71 Definitions; procedure to obtain adjudication of validity of issuance of securities; defendants.

(A) As used in sections 133.71 to 133.80, inclusive, of the Revised Code:

(1) "Issuer" means the state, or any county, municipality, township, board of education, taxing district, political district, subdivision or division; or any subdivision, division, district, commission, authority, department, board, officer, or institution; body corporate and politic or other public entity which is authorized by law to borrow money and issue securities.

(2) "Securities" means bonds, notes, or evidences of indebtedness.

(B) An issuer, prior to the issuance of any particular issue of securities which it proposes to issue may file a

petition for validation and thereby commence an action for the purpose of obtaining an adjudication of its authority to issue the securities and the validity of the proceedings taken and proposed to be taken in connection therewith, including but not limited to any assessments of taxes levied or to be levied, and the lien of such taxes, the levy of rates, charges, or tolls, and proceedings or other remedies for the collections of such taxes, rates, charges, or tolls. No such action shall be commenced except upon determination of the necessity thereof by the authority empowered to adopt the resolution, ordinance, or order for the issuance of these securities. Such action may be brought in the court of common pleas of the county in which the issuer is located in whole or in part or has its principal place of business. The auditor of state and the county auditor of the county in which the action is brought shall be named as party defendants. Service of summons shall, unless waived, be made upon such parties in the manner provided for service of summons in civil actions. The property owners, taxpayers, and citizens of the issuer, including nonresident owners of property subject to taxation or special assessment by the issuer and all other persons affected by or interested in the issuance of the securities, shall be joined as defendants to the same extent as if individually named in the petition. If the securities are to be issued by the state or by any commission, authority, department, board, institution, or other agency of the state, such action shall be brought in the court of common pleas of Franklin county. The auditor of state and the auditor of Franklin county shall be named as party defendants, and the taxpayers, property owners, and citizens thereof, including nonresident owners of property subject to taxation or special assessment by the issuer and any other persons affected by or interested in the issuance of the securities shall be

joined as defendants to the same extent as if individually named in the petition.

Section 133.72 Validation petition.

The petition for validation shall contain, in ordinary and precise language and by references or exhibits, a statement of the issuer's existence and authority for issuing the securities, the holding and result of an election where an election is required, the ordinance, resolution, or other act or proceeding authorizing the issuance of the securities and the adoption thereof, all other essential proceedings taken and proposed to be taken in connection therewith, the amount and terms of the securities to be issued, the county or counties in which the proceeds of the securities, or any part thereof, are to be expended, and other pertinent matters.

Section 133.73 Notice; duty of prosecuting attorney and attorney general.

Upon the filing and presentation of the petition, the court shall issue an order in general terms in the form of a notice directed to the state and to "all property owners, taxpayers, citizens, and others having or claiming any right, title, or interest in any property or funds to be affected by the issuance of the securities or affected in any way thereby," requiring the state through its attorney general and all such persons to appear and be heard before the court at a time to be designated in such order, and show cause why the prayer of the petition should not be granted and the proceedings and the securities validated and confirmed as therein prayed. At least twenty days before the time fixed in said order for hearing[,] a copy of the petition and order shall be served personally or by registered mail upon the prosecuting attorney of the county

in which the action is pending, the prosecuting attorney of each county where the issuer lies or functions in whole or in part, and the prosecuting attorney of each county in which it is proposed to expend any of the proceeds of the sale of the securities, and upon the attorney general of the state, and any other party as the court may direct. It shall not be necessary to serve more than one copy of the petition and order upon any one prosecuting attorney. Said attorney or attorneys shall carefully examine the petition and if it appears, or there is reason to believe, that the petition is defective, insufficient, or untrue, or if in the opinion of said attorney or attorneys, the issuance of the securities is not lawful or has not been duly authorized, defense shall be made thereto as may be deemed proper by said attorney or attorneys.

Section 133.74 Publication of order.

The clerk of the court where the petition is filed shall cause a copy of said order to be published once a week for three consecutive calendar weeks, in a newspaper of general circulation in the county where the petition is filed, in each county where the issuer lies or functions in whole or in part, and in each county in which it is proposed to expend any of the proceeds of the sale of the securities. If the securities are to be issued by the state or by any commission, authority, department, board, institution, or other agency of the state the order shall also be published in a newspaper of general circulation in Franklin county. The first publication in each county shall be made not less than twenty-one nor more than thirty days prior to the date set for hearing. Upon the last publication of said order, service upon all property owners, taxpayers, citizens, or others having or claiming any right, title, or interest in or against the petitioner or property subject to taxation or

special assessment thereby or otherwise affected by or interested in the issuance of the securities described in the petition shall be complete, and the court shall have jurisdiction of them to the same extent as if individually named in the petition and personally served.

Section 133.75 Access to records.

The attorney or attorneys mentioned in section 133.73 of the Revised Code and any other person made a defendant or his counsel shall have access to all pertinent records and proceedings of the issuer at any reasonable time and for the purpose of defending the action. Any officer, agent, or employee of the issuer who has charge, possession, custody, or control of any of the pertinent records and proceedings of the issuer shall, on demand of such person, make available for examination such records and proceedings and shall furnish such duly authenticated copies thereof as may be demanded of him.

Section 133.76 Injunction against commencing other suits; consolidation of pending actions.

Upon motion of the issuer, whether before or after the date set for hearing as provided in section 133.73 of the Revised Code, the court may enjoin any person from commencing any other action or proceeding contesting the validity of the securities described in the petition, or the validity of the proceedings taken or proposed to be taken in connection therewith, including but not limited to any taxes, special assessments, tolls, rates, or other levies authorized to be imposed or made for the payment of such securities or the interest thereon, or the validity of any pledge of revenues, or property to secure such payment. The court may order a joint hearing or trial before it of all such issues then pending in any action or

proceeding in any court in the state, and may order any such action or proceeding consolidated with the validation petition pending before it, and may make such order as may be necessary or proper to effect such consolidation and as may tend to avoid unnecessary costs or delays or multiplicity of suits. Such orders shall not be appealable.

Section 133.77 Additional defendants.

Any property owner, taxpayer, citizen, or person affected by or interested in the issuance of the securities may become a named party to the action by pleading to the petition at or before the time set for the hearing provided in section 133.73 of the Revised Code, or thereafter by intervention upon leave of court. At the time designated in the order for hearing, the court shall proceed to hear and determine all questions of law and fact in the action and may make such interlocutory orders and such adjournments as will enable it properly to try and determine the same and to render a final decree therein with the least possible delay.

Section 133.78 Appeal.

Any party to the action, whether the issuer, a defendant, an intervenor, or otherwise, dissatisfied with the final decree may appeal therefrom on questions of law only to the court of appeals notwithstanding the provisions of section 2501.02 of the Revised Code. Such appeal shall take priority over all other civil cases therein pending, except habeas corpus. No oral argument on any motion for a new trial or for rehearing shall be permitted except at the request of the court on its own motion.

Section 133.79 Court decree a permanent injunction.

In the event the decree of the common pleas court de-

termines that the issuer has authority to issue the securities upon the terms set forth in the petition for validation and adjudicates the legality of all proceedings taken and proposed to be taken in connection therewith and no appeal is taken within the twenty-day period above prescribed by section 2505.07 of the Revised Code, or if taken and the decree of the common pleas court is affirmed, such decree shall be forever binding and conclusive, as to all matters adjudicated, against the issuer and all other parties to the action, and their privies, whether named or included in the description "all property owners, taxpayers, citizens, and others having or claiming any right, title, or interest in any properties or funds to be affected by the issuance of the securities or affected in any way thereby," and shall constitute a permanent injunction against contesting the validity of the securities described in the petition, the validity of the taxes, special assessments, tolls, rates, or other levies authorized to be made for the payment thereof or the interest thereon, or the validity of any pledge of revenue or property to secure such payment, by any person in any action or proceeding, provided that all procedural steps required to be taken for the completion of the issuance and sale of the securities, after the date of such decree, shall be properly taken in accordance with the applicable provisions of law and the terms of such decree.

Such decree shall not be construed to permanently enjoin any person not a named party to the action from raising a claim or defense seeking relief in whole or in part from any levy of taxes or special assessments, made or to be made or collected or to be collected against property owned by such person, authorized for the payment of the securities described in the petition or the interest thereon, where such claim or defense is based upon a right which such person may have only in his individual

capacity as an owner of the property subject to such tax or special assessment, including but not limited to such rights as may be provided by sections 727.02, 727.15, 727.16, and 727.17 of the Revised Code.

Section 133.80 Costs.

The costs of each action under sections 133.71 to 133.80, inclusive, of the Revised Code, shall be paid by the petitioner, except where a taxpayer, citizen, or other person has contested the action, intervened therein, or appealed, the court may tax the whole or such part of the costs against such person as is equitable and just.

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No. 1352

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1967

ROBERT H. FOSDICK
and
GRAHAM P. HUNT, JR.,
Appellants,

v.

HAMILTON COUNTY, OHIO,
Appellee.

On Appeal From the Supreme Court of the State of Ohio

MOTION TO DISMISS APPEAL

May, 17, 1968

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STATEMENT OF THE CASE

This case was brought as a statutory bond validation suit under Ohio Revised Code sections 133.71 - 133.80 (Supp. 1966), whereunder a bond-issuing authority, such as Hamilton County, may seek an adjudication of the validity of bonds authorized but unissued, together with an adjudication of the validity of proceedings taken and proposed to be taken in connection therewith. In its Judgment Entry and Decree, entered on October 13, 1967, the Court of Common Pleas found that Hamilton County had authority to issue $42,250,000 principal amount of Stadium Revenue

Bonds, 1967 Series, for the purpose of constructing a public stadium with related parking facilities, pursuant to a co-operative agreement with the City of Cincinnati under Ohio Revised Code section 153.61 (Supp. 1966), and to secure said bonds with revenue to be received under a proposed lease of the facility to the City of Cincinnati. A copy of the Judgment Entry and Decree appears as Appendix C to appellants' Jurisdictional Statement herein.

This judgment was affirmed per curiam by the First District Court of Appeals on November 20, 1967.

Appellants Hunt and Fosdick appeal from the judgment of the Supreme Court of Ohio dismissing their appeals from the judgment of the First District Court of Appeals. In the Supreme Court of Ohio, the instant case, captioned *Hamilton County, Ohio* v. *Cloud, Auditor of State, et al.*, was consolidated for purposes of argument with *Bazell* v. *City of Cincinnati, et al.*, a taxpayer's suit in which Bazell had sought to enjoin the City of Cincinnati from expending any further funds on a public stadium. The consolidated cases are reported under the name *Bazell* v. *City of Cincinnati*, 13 Ohio St. 2d 63 (1968). No appeal or petition for writ of certiorari has been filed with respect to the judgment in *Bazell*.

Appellee moves the Court to dismiss the appeal herein on the following grounds:

I. APPELLANTS' JURISDICTIONAL STATEMENT DOES NOT CONFORM TO RULE 15 OF THE SUPREME COURT RULES.

Appellants' jurisdictional statement does not comply with Rule 15 in the following particulars, among others:

(A) It does not show the statutory provision believed,

to confer on the Court jurisdiction of the appeal. Sup. Ct. R. 15 (1) (b) (iii).

(B) It does not show cases believed to sustain the jurisdiction. Sup. Ct. R. 15 (1) (b) (iv).

(C) The substance of the questions presented (insofar as may be discovered from the text of the Jurisdictional Statement) is at substantial variance with the questions presented as listed in the notice of appeal, in that appellants now allege for the first time "undue pressure of appellate courts and shortening time ordinarily permitted for appellate work" (Jurisdictional Statement, p. 3) as well as that "enormous sums are taken without due process of law contrary to Amendment XIV Section 1, U. S. Constitution" (Jurisdictional Statement, p. 2). See Sup. Ct. R. 15 (1) (c).

(D) It does not contain a concise statement of the case containing the facts material to the consideration of the questions presented. Sup. Ct. R. 15 (1) (d).

(E) It does not specify the stage in the proceedings in the Court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them; and the way in which they were passed upon by the court; nor does it include any of the other information required by the second sentence of Rule 15 (1) (d).

(F) It does not include a presentation of the grounds upon which it is contended that the federal questions are substantial, nor does it otherwise comply with Rule 15 (1) (e).

(G) The copy of the opinion of the Supreme Court of Ohio appended as "Appendix A" is not a true and complete copy of such opinion, as required by Rule 15 (1) (h), in that the syllabus of such opinion was omitted. The Ohio Supreme Court, except for per curiam opinions, speaks only through the syllabus of the case. See *Beck* v.

Ohio, 379 U.S. 89, 93 & n. 2 (1964); *Perkins* v. *Consol. Min. Co.,* 342 U.S. 437, 441 & n. 3, 442 (1952).

(H) To the extent that it contains elements of the information required by Rule 15, such information is not contained in the order required by Rule 15, but is presented in jumbled and often unintelligible fashion.

II. THE JUDGMENT SOUGHT TO BE REVIEWED RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

The appeals of Messrs. Hunt and Fosdick to the Supreme Court of Ohio were dismissed by reason of their failure to perfect their appeals:

> In the bond validation case, defendants Hunt and Fosdick filed briefs in this court as appellants. Although notices of appeal were filed in the Court of Appeals by those two defendants on December 12, 1967, no copies of those notices were filed by those defendants in this court within 20 days thereafter, as required by Section 1 (A) of Rule I of this court, and hence their appeals are dismissed pursuant to Section 1 of Rule II.
>
> *Bazell* v. *City of Cincinnati* 13 Ohio St. 2d 63, at 75 (1968)

Paragraph 5 of the syllabus of the Supreme Court of Ohio is as follows:

> 5. Where a notice of appeal from a judgment of the Court of Appeals is duly filed in the Court of Appeals but no copy of such notice is filed in the Supreme Court within 20 days after such filing in the Court of Appeals as required by Section 1 (A), Rule I, of the Supreme Court, such appeal will be dismissed pursuant to Section 1 of Rule II.
>
> *Bazell* v. *City of Cincinnati* 13 Ohio St. 2d 63, at 64 (1968)

Thus, neither the Ohio Supreme Court's judgment of dismissal nor the judgment of the First District Court of Appeals on the merits is reviewable by this court. *Newman* v. *Gates*, 204 U.S. 89 (1907); *Chesapeake & Ohio R. Co.* v. *McDonald*, 214 U.S. 191 (1909); *cf. Hammerstein* v. *Superior Court*, 341 U.S. 491, 492 (1951).

III. THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE NOT TIMELY OR PROPERLY RAISED OR EXPRESSLY PASSED UPON.

In the court of first instance (the Court of Common Pleas of Hamilton County, Ohio) the only arguably federal questions raised by either appellant concerned the constitutionality of Ohio Revised Code section 133.80 (Supp. 1966). During a colloquy with the court, appellant Hunt stated that section 133.80 was "unconstitutional" and was "a threat to the taxpayer who comes in here to stand up for his rights and as such is a denial of his day in court and due process of law." Record of July 5, 1967, pp. 20, 21. No specific provision of either the Ohio Constitution or the federal Constitution was mentioned, nor did either appellant indicate to which constitution reference was had.

The Court of Common Pleas, with no indication as to whether it considered the question raised under the state or under the federal constitutions, held this argument to be "without merit." *Hamilton County* v. *Cloud*, 171 O.O. 2d 171, 172-173 (1967).

In the intermediate appellate court (The First District Court of Appeals), appellant Hunt filed a two-page brief in which no claims of unconstitutionality of section 133.80 or any other statute were advanced.

In the Supreme Court of Ohio, appellants filed a joint brief. Under the heading "Questions of Law Presented as Demurrer of Graham P. Hunt, Jr.," section 133.80 was

again characterized as "unconstitutional," without more. Brief for Appellants, p. 6, *Bazell* v. *City of Cincinnati,* 13 Ohio St. 2d 63 (1968). Under the heading "Why Case is of Public and Great General Interest," appellants said that "a constitutional question exists where a taxpayer can be assessed for the entire costs which in this case could be substantial." *Id.* at p. 10. As noted above, the appeals of appellants Hunt and Fosdick were dismissed by reason of their failure to perfect the same; thus, the questions raised in their brief were not passed upon by the Ohio Supreme Court.

Moreover, this Court has held that a mere reference to the "Constitution of the United States" or to the "Constitution and laws of the United States" does not suffice to raise the federal question. *Herndon* v. *Georgia,* 295 U.S. 441, 442-43 (1935); *Harding* v. *Illinois,* 196 U.S. 78, 88 (1904); *Capital City Dairy Co.* v. *Ohio,* 183 U.S. 238, 248 (1902); *Oxley Stave Co.* v. *Butler County,* 166 U.S. 648 (1897). Similarly, reference to "due process of law" will not suffice, at least where the state constitution has a due process clause. *Bowe* v. *Scott,* 233 U.S. 658, 664-65 (1914). Ohio's Constitution provides for "remedy by due course of law," Constitution of Ohio, Art. I, § 16, and this provision has been treated as the equivalent of the Fourteenth Amendment's due process clause. *Adler* v. *Whitbeck,* 44 Ohio St. 539, 569, 9 N.E. 672, 679 (1887); *Salt Creek Valley Turnpike Co.* v. *Parks,* 50 Ohio St. 568, 35 N.E. 304 (1893); *City of Akron* v. *Chapman,* 160 Ohio St. 382, 116 N.E. 2d 697 (1953). Further, if the claim is advanced that a state statute is "unconstitutional" or denies "constitutional rights," it will be assumed that the reference is to the state constitution rather than to the federal Constitution. *New York ex rel. Bryant* v. *Zimmerman,* 278 U.S. 63, 67-68 (1928). In *New York Central & H. R. Co.* v. *New York,* 186 U.S. 269, 273 (1902), this court held

that "it is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and that such provision must be set forth."

Under these holdings, appellants cannot contend that the federal questions as to which they seek review were either timely or properly raised or expressly passed upon.

IV. THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Appellants do not assert that any portion of the costs incurred below have been taxed against them under Ohio Revised Code Section 133.80 (Supp. 1966) nor against third parties. In fact, all costs below to and including April 16, 1968, as shown on the records of the Clerk of Courts of Hamilton County, Ohio, have been paid by or on behalf of the appellee, and amounted to only $204.05, or barely four per cent of the amount suggested by appellants as a figure which costs "could have easily exceeded." Jurisdictional Statement, p. 4. No further costs below are foreseeable.

Under these circumstances, there is patently no substance in the question appellants have attempted to present.

Respectfully submitted,

FRANK H. SHAFFER, JR.
Counsel for Appellee

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

FOSDICK ET AL. *v.* HAMILTON COUNTY, OHIO, ISSUER.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 1352. Decided June 3, 1968.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.